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No. 93-1975

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT HADEN KING, JR.,

Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONSE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was obligated independently to review the state court's determination of petitioner's competency to withdraw from the plea agreement when the issue of his competency was not raised at trial or on appeal as a basis for federal habeas relief.

2. Whether petitioner was entitled to an evidentiary hearing on his competency to withdraw from the plea agreement when he did not request an evidentiary hearing on that issue.

3. Whether the particular facts and circumstances surrounding the dismissal of the petitioner's original indictment and his subsequent reindictment provided "good cause" to toll the time limits established by the Interstate Agreement on Detainers.

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RESPONSE IN OPPOSITION

INTRODUCTION

Respondent, State of Oregon, finds little in the petition for writ of certiorari with which it can agree. Even disregarding their gratuitous attacks on the quality of justice in Oregon[1] and the integrity of the officials who prosecuted this case,[2] petitioner and

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[1]The petition's statement of the case, for example, opens with the hyperbolic declaration: "Something is rotten in Oregon." Pet. Cert. 2.

[2]Petitioner and his *amici* come perilously close to accusing the members of the Clackamas County District Attorney's Office of unethical conduct when they charge that the state secured petitioner's presence in Oregon pursuant to an indictment that "it" knew was "patently unconstitutional under Oregon law." Pet. Cert. 20. *See also* n. 28, *infra* (discussing similar

(continued...)

his *amici* largely lose sight of the factual and procedural posture of this case. As a result, they misidentify the issues that the case fairly presents. This response therefore begins by offering a more complete description of the facts surrounding petitioner's withdrawal of his guilty plea. It then responds to each of the questions the petition presents, clarifying the procedural context as necessary and demonstrating in what way the question either is not presented at all, or is not the same question that petitioner seeks to have the Court decide.

SUPPLEMENTAL STATEMENT OF FACTS

The petition paints a picture of a seriously mentally ill criminal defendant who struck a plea bargain with prosecutors that they later, wholly without justification, refused to permit him to perform. Petitioner's description suggests that the state gained the full benefit of the plea bargain (information about the crime and petitioner's testimony against his co-defendant) and then took advantage of the petitioner's failure "formally" to enter his guilty plea as a basis to abandon the agreement altogether. The light in which petitioner has cast this case is, however, neither accurate, complete nor fair. Petitioner was, instead, a criminal defendant who became dissatisfied with the terms of the plea bargain he struck, who then tried unsuccessfully to alter those terms, and who declined to follow through on the plea agreement and insisted on going to trial when he could not get it changed.

In August of 1983, petitioner agreed in writing to plead guilty in exchange for the state's agreement to reduce the charge from

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[2](...continued)

statements by *amici*). As discussed later in this response, the original indictment met all constitutional requirements and there is no question that, under state law, it should not have been dismissed by the trial court in the first instance.

aggravated murder (potentially a capital offense) to murder. Petitioner further agreed to provide information relevant to the investigation of other participants in the murder, and to testify against those other participants, including James Salter. The state agreed to recommend a life sentence, with a 10-year minimum sentence before parole eligibility, to be served concurrently with any other sentence petitioner was then serving. In December of 1983, petitioner requested a continuance of the entry of his guilty plea. By January or February of 1984, however, petitioner no longer liked the terms of the plea agreement. Even though he already had performed many of his responsibilities under the plea bargain (*i.e.*, he had provided investigatory information and he had testified in some of the proceedings relating to James Salter), petitioner wanted to strike a new deal. Specifically, he wanted his custody transferred to another state. Petitioner emphasizes in the certiorari petition that he was fearful that his life was in danger because of his cooperation against his co-defendants, and that he wanted the transfer for protection. Pet. Cert. 4–5. But he neglects to explain that his demand was specifically limited to a transfer to the State of Alabama, where petitioner's father practices law.[3] Exh. 119, at 516-P and -Q.[4] He also neglects to explain that he did not merely seek "permission to serve his sentence in * * * Alabama" (Pet. Cert. 5); rather, he wanted the State of Oregon to give Alabama authorities complete control over his legal custody, and specifically over parole and pardon decisions. *Ibid.* That demand simply was unacceptable, and state prosecutors would not agree to it.

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[3]Petitioner's father is now among the lawyers representing him.

[4]Exhibit 119 is the state court transcript, which was made a part of the record in the federal habeas proceedings.

There is no question that petitioner suffers from a head injury incurred years earlier in an accident, that the accident evidently has altered petitioner's emotions and judgment, and that he requires medication for seizures.[5] But until his dissatisfaction with the plea agreement, petitioner had been able to proceed without any question as to his competency. He had been arraigned, he had negotiated and signed the plea agreement, he had provided investigatory information to police, he had testified in a "most impressive and professional manner" at James Salter's grand jury hearing, and he been an effective witness at Salter's bail hearing. Exh. 119, at 516-L through 516-O. When the state did not agree to the new demand to give up control over his physical and legal custody to Alabama, however, petitioner warned prosecutors that he would stop taking his medications and become psychotic. *Ibid.* His threat was consistent with earlier statements to jail personnel that, because he had minored in psychology in college and had studied the symptoms of mental illness, he knew how to "fake" mental illness. Exh. 119, at 516-H and -I. Despite the threat, the state stood by its refusal to alter the plea agreement. Petitioner, true to his word, stopped taking his medication.

Petitioner's condition deteriorated after that, whether because he was feigning incompetency or because he successfully impaired his competency by not taking his medication. Jail personnel, for example, observed him deliberately make himself look unkempt at strategic times — *i.e.*, before he was to appear as a witness at James Salter's trial and before he was examined by a physician appointed by the court to determine his competen-

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[5]*See, e.g.*, Pet. Cert. App. 55a–62a (physicians' reports).

cy to stand trial.[6] His mental state either was erratic and unstable, or contrived. When he attended Salter's trial, for example, his competency as a witness was determined in a hearing outside the jury's presence. In the course of that preliminary examination, he gave confused and incoherent answers. After the court found him to be a competent witness and he was required to testify before the jury in the Salter trial, he immediately became able to answer all of the state's questions without uncertainty or hesitation. Exh. 119, at 516-T through -AA.[7]

During this period, his competency to proceed in his own case became an issue for the first time. Petitioner appeared before the state court judge on February 24, 1984, to ask permission to proceed *pro se* and to withdraw from his plea agreement. The court cautioned him against withdrawing from the plea bargain, told him to consider his decision further, and

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[6]Petitioner stopped shaving, brushed his hair in front of his face, pulled his shirt out of his trousers, went without shoes and wore sweatclothes in place of the three-piece suits he wore to prior court appearances. Exh. 119, at 516-D, -E, -F, and -T.

[7]A newspaper report that petitioner placed in the record of the federal habeas proceeding described petitioner's remarkable transformation:

> King's testimony before the jury came after a morning marked by a bizarre turn of events when a disheveled, incoherent sounding King claimed, with the jury out of the courtroom, that he didn't know where he was or why he was being held in the Clackamas County jail. * * * Clackamas County Circuit Judge Patrick Gilroy, after hearing testimony from several county sheriff's deputies, ruled King was faking symptoms of insanity, and therefore was competent to testify, which, he pointed out, is not the same thing as being fit to stand trial. * * * King spoke with a ponderous Southern Accent and often held his head in his hands during testimony. Still, that was a far cry from the unkempt, confused-sounding King who testified out of view of the jury Wednesday * * *.

Exh. 42, at 1.

scheduled a hearing for three days later.[8] At the hearing, petitioner's attorney questioned petitioner's competency to make the decision to represent himself. Exh. 117, at 34. The court ordered petitioner to be examined by Dr. Parvaresh, whose examination was inconclusive. Exh. 117, at 39; Exh. 111; Pet. Cert. App. 58a. Dr. Parvaresh believed, however, that if petitioner would resume his medication, he would be stable enough to be reexamined in seven to ten days. Exh. 111; Pet. Cert. 58a. By March 12, 1984, petitioner still was not taking his medication; the court therefore ordered that petitioner be committed to the state mental hospital for further examination. Exh. 119, at 478.

On May 31, 1984, petitioner appeared before the trial court with his attorney, Mr. Lyons, who advised the court that petitioner during the prior two weeks had been taking his medication and that, as suggested by the report of Dr. Parvaresh, he was again competent to proceed.[9] Despite the fact that neither

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[8]The court informed petitioner that if he reneged on the agreement, "you're back in the very vulnerable position you were in before you made your agreement, plus they have two days of your testimony, it seems like a foolish move on your part." Exh. 117, at 25.

[9]Mr. Lyons' statement to the court was quoted at length by the Oregon Court of Appeals when it affirmed petitioner's conviction:

> Your Honor, over the past couple weeks it apparently has been — the situation appears to be Mr. King has reinstated the use of his medication. That appears to be the information from the jail staff. And Mr. King himself, in conversation that I had with him over the last couple days, including up to and last evening, it appears that the medications are at — Dr. Parvaresh indicates in his report as well as Dr. Larson having the effect on Mr. King which they intended that they would, which is that *he is presently able to understand the nature of the proceedings against him and that he is able to assist*. At this time, based on that and the conversations I have had with Mr. King in which it does appear to me that

(continued...)

petitioner nor his attorney seemed to be questioning petitioner's competency, the state, out of an abundance of caution, put on expert testimony demonstrating petitioner's competency.[10] The court ruled that petitioner was able to aid and assist in his defense, and thus was competent to proceed.[11] Defense counsel immediately asked the court to set a trial date. The prosecutor reminded the court that there was a plea agreement in the case and asked for a commitment as to whether petitioner intended to

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[9](...continued)

> although these reports indicate he does, in fact, suffer from a mental illness, nonetheless on his medications, *he is able to understand the nature of the proceedings against him and to assist his counsel as to the proceedings against him.*

State v. King, 84 Or. App. 165, 174, 733 P.2d 472 *rev. denied*, 303 Or. 455 (1987) (emphasis added by the Oregon Court of Appeals) *quoting* Exh. 119, at 483-C and -D. *See also* Exh. 119, at 483-C, -E, -F (counsel acknowledges that petitioner is stable, understands the nature of the proceedings and his options, and is able to aid and assist in his defense).

[10]The state offered the testimony of a psychiatrist with 18 years experience on the maximum security wards at the state mental hospital. Exh. 119, at 485. The doctor stated that he observed no hallucinatory or psychotic behavior on petitioner's part during his stay in the hospital. The doctor's diagnosis was that petitioner suffered from brain damage which affected his emotions and judgment, but not his intellectual capacity or his memory. Exh. 119, at 490. He described petitioner's refusal to take his medication as self-serving maneuvering designed to make him appear psychotic. Exh. 119, at 492.

[11]The trial court stated:

> I think that even considering the report of the other doctors, and what his behavior has been subsequent to that time, there is no question in my mind that he now understands the nature of the proceedings and that he is able to assist and cooperate with counsel and is able to participate in his defense.
>
> So you can put those findings in, if you want, in preparing the order, that I do find that he has a mental defect. But the other findings support, I think, the conclusion that he is able to proceed in his own defense.

Exh. 119, at 518-19.

enter a guilty plea. The defense was noncommittal,[12] and the court instructed the state to file a formal motion to set aside the plea agreement so that the matter could be resolved. Exh. 119, at 520–21.

The motion was heard on July 9, 1984, at which time one of petitioner's attorneys made it clear that the defense wanted more time to continue to try to work out an agreement to transfer petitioner's legal custody to Alabama. Exh. 119, at 524–25 (co-counsel Mr. Clancy). The state pointed out that most of its witnesses were out of state and that it did not want to embark on expensive trial preparations if petitioner intended to plead guilty. Exh. 119, at 525–26. The deputy district attorney stated that, based on petitioner's request for a trial date, he believed petitioner was withdrawing from the agreement. Exh. 119, at 526. The court asked defense counsel, Mr. Lyons, if he wanted to add anything. Mr. Lyons said that he had nothing to add. *Id.* The court found that defendant had rescinded the plea agreement and nullified it.[13]

REASONS TO DENY THE WRIT

I. Petitioner's first question presented was not raised as a ground for federal habeas corpus relief.

As a first basis for certiorari, petitioner asserts that this case presents the Court with "a perfect opportunity to clarify the

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[12]Neither petitioner nor defense counsel disputed the deputy district attorney's assertion that petitioner was seeking to withdraw from the plea agreement by asking for a trial date. Nor did either suggest to the trial court that petitioner intended to comply with the agreement, that he objected to setting the agreement aside or that he objected to the entry of a not guilty plea. Exh. 119, at 510–11.

[13]That order was not made a part of this record. The Oregon Court of Appeals quoted it in its opinion affirming petitioner's conviction. *State v. King, supra*, 84 Or. App. at 175.

Court's decisions that underlie the circuit split of authority as to the factual and legal nature of the competency determination." Pet. Cert. 11. There are two problems with petitioner's presentation of this issue. The first is that the issue of petitioner's competency was not raised as a ground for federal habeas relief. The second problem is related: Because petitioner did not seek habeas relief on the basis that the state court erroneously determined that he was competent to rescind the plea agreement, petitioner has never before (until this petition for certiorari) questioned the legal standard applied by the state court. If the state court's resolution of petitioner's competency is properly an issue in this case at all, it is squarely controlled by this Court's decision in *Maggio v. Fulford*, 462 U.S. 111 (1983).

1. *Lack of preservation.*

Most of the procedural and factual misimpressions created by the petition are a result of omission. There is, however, one explicitly incorrect assertion in the petition's statement of the case, and it is critical to the first question presented. Petitioner states that he specifically asked the district court to decide, among other issues, whether "he was competent to withdraw from the plea agreement." Pet. Cert. 9. That statement is simply wrong.[14]

The petition for writ of habeas corpus asserted only three grounds for relief: (1) that petitioner's due process and self-incrimination rights were violated because the trial court would not specifically enforce the plea agreement; (2) that petitioner's

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[14]On appeal to the Ninth Circuit, petitioner made the same wrong assertion. App. Br. 12. The state, in response, did not take petitioner to task on the point because petitioner was not, in any event, raising or arguing the issue on appeal. The dissenting opinion uncritically accepted petitioner's erroneous characterization of the issues before the district court. Pet. Cert. App. 22a.

prosecution was barred under the Interstate Agreement on Detainers (IAD) because petitioner is "mentally ill"; and (3) that the prosecution was barred under the speedy trial provisions of the IAD. App. 4–6 (Pet. for Writ of Habeas Corpus). There was no claim that petitioner was not competent to withdraw from the plea bargain, or that the state court either legally or factually erred in making the competency determination.

Petitioner later filed a memorandum in response to the state's motion to deny habeas corpus relief. In it, petitioner expressly abandoned the only claim that contained any reference to his mental state — *i.e.*, whether the IAD barred his prosecution on the basis that he was mentally ill. Pet. Memo. 2. Nothing in the memorandum challenged the state trial court's finding that petitioner was competent at the time he withdrew from the plea agreement. That is, petitioner did not ask the federal district court to revisit the issue of his competency; he did not claim that the state court had applied an incorrect legal standard in making that determination; he did not request an evidentiary hearing on the subject of his competency to withdraw from the agreement. *See generally* Pet. Memo. The Findings and Recommendation issued by the magistrate, and adopted by the district judge, confirmed that the only issues to be resolved by the court were whether petitioner was entitled to insist on specific enforcement of the plea agreement and whether the prosecution was barred by the IAD's speedy trial provisions. Findings and Recommendation, at 2; Order, April 21, 1992.

Nor did petitioner raise the question of his competency in his appeal to the Ninth Circuit. The only question he presented to the court below that had any bearing on the plea agreement was whether the state violated petitioner's due process rights when it failed to honor the plea bargain after petitioner had fully per-

formed his obligations under it. *See* App. Br. i. Again, petitioner did not argue that he was not competent to withdraw from the plea agreement; he did not claim that the state court had applied an incorrect legal standard to judge competency, or that its factual findings were unsupported or made without a full and fair evidentiary hearing; he did not ask the appeals court to order the district court to consider his competency to withdraw from the agreement or to hold an evidentiary hearing on his competency. Nor did he ask the appeals court to apply a different legal standard to the facts of competency found by the state court. *See generally* App. Br. Indeed, the majority expressly recognized that petitioner did not challenge *any* aspect of the state court's ruling that he was competent to stand trial: "The [state] court ruled that King was competent to stand trial, and that ruling is not challenged in this appeal." Pet. Cert. App. 6a.

Petitioner nevertheless reads the decision below to hold that the question of his competency to withdraw the plea agreement was purely one of fact, rather than a question of fact to be resolved pursuant to a correct legal standard for competency. To infer that holding would be unfair to the lower court, however, because whether competency is a question of fact or a mixed question of law and fact, and whether the state court below applied the correct legal standard, were never remotely at issue in this case. Petitioner's failure to raise any claim about his competency is probably explained by the fact that he and his attorney conceded rather than contested his competency when petitioner refused to enter a guilty plea and insisted instead on a trial date. The majority opinion discussed petitioner's competency only in response to the dissenting opinion's passing reference to

doubts about petitioner's mental state[15] and as a foreword to the majority's agreement with the state court's determination that it was petitioner, not the state, who chose to abrogate the plea agreement. Pet. Cert. App. 12a.

In short, contrary to petitioner's argument, the Ninth Circuit did not hold that the legal standard for competency applied by the state courts is insulated from habeas review; the issue was not before the appellate court below. The question petitioner seeks to have the Court decide simply is not presented in this case.

2. *There is no significant question for this Court to settle.*

Even if the Ninth Circuit's decision, by *dictum* or otherwise, suggests that it deferred to the state court competency determination, that deference was proper under *Maggio v. Fulford*, *supra*. In *Maggio*, this Court held that competency is a factual question in which the state court's determination is subject to the presumption of correctness when there is "no dispute as to the proper legal standard to be applied for determining the correctness of the trial court's actions." 462 U.S. at 116. The same was true in *Demosthenes v. Baal*, 495 U.S. 731 (1990). Petitioner relegates those cases to a footnote and tries to distinguish them on the basis that "[n]o legal issues surrounding the competency determination were involved." Pet. Cert. 13 n. 3. But the posture here is identical. As in *Maggio* and *Demosthenes*, petitioner never disputed the legal standard that the

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[15]Pet. Cert. App. 25a–26a. The dissenting judge did not conclude that petitioner was not competent to withdraw his plea. Rather, the dissent was unwilling to construe petitioner's refusal to plead guilty as a rescission of the plea agreement due to several considerations, including concerns that petitioner was not competent on February 24, 1984, when he first attempted to represent himself and withdraw from the plea. Even the dissent did not appear to doubt petitioner's competency on May 31, 1984, at which point he had resumed his medication and was again cooperating with his attorney.

state court applied to the competency determination. To whatever extent the Ninth Circuit's decision can be read to review the state court's competency determination, that determination appropriately was reviewed by applying a presumption of correctness to the factual findings made by the state court because of the absence of a challenge to that legal standard.[16]

Petitioner's effort to manufacture a conflict among the circuits fails for the same reason. Each of the cases petitioner cites as holding that the legal standard for competency is beyond the scope of federal habeas review merely recognized, consistent with *Maggio*, that competency is solely a question of fact *if* the legal standard is not at issue.[17]

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[16]The Ninth Circuit's decision in *Moran v. Godinez*, 972 F.2d 263 (9th Cir. 1992), *rev'd on other grounds*, *Godinez v. Moran*, 509 U.S. ___, 113 S. Ct. 2680 (1993), demonstrates that the court understands the correct approach when the legal standard is at issue:

> Even if the presumption of correctness could apply to a state court's finding that defendant was competent to waive constitutional rights, it cannot apply in Moran's case. This is so because, as the following discussion demonstrates, the state court applied the wrong legal standard to evaluate Moran's competency to waive constitutional rights.

972 F.2d at 266. Although this Court reversed the Ninth Circuit because the legal competency standard the court applied was incorrect, this Court expressed no reservation about the Ninth Circuit's understanding of the interaction of law and fact in resolving these questions.

[17]Petitioner cites *Spitzweiser-Wittgenstein v. Newton*, 978 F.2d 1195 (10th Cir. 1992); *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991); and *Flugence v. Butler*, 848 F.2d 77 (5th Cir. 1988), as holding that the federal courts may not review the state court's determination of competency if it is fairly supported by the record. Each case, however, like *Maggio* and this one, raised no question about the correctness of the legal standard applied by the state court. Moreover, two of those circuits unequivocally have demonstrated their recognition that the federal courts must review the legal standard applied by the state court if it is challenged. *See Bouchillon v. Collins*, 907 F.2d 589, 593 n. 11 (5th Cir. 1990) (acknowledging that the

(continued...)

Moreover, it is difficult to understand why petitioner thinks the question of the "factual and legal nature of the competency determination" (Pet. Cert. 11) warrants the Court's attention so soon after its decision in *Godinez v. Moran*, 509 U.S. ___, 113 S.Ct. 2680 (1993). There, the Court addressed the legal standard to be applied on habeas review of state court determinations of competency to waive constitutional rights. In light of that case, it is unlikely that the circuits would not be aware that some legal standard must be applied to a state courts' factual findings on competency when a petitioner's claim properly raises the issue.

Finally, petitioner's effort to suggest, for the first time in the petition for certiorari, that the state court applied an incorrect legal standard founders on his trial counsel's acknowledgment that petitioner was fit to aid and assist in his defense. *Godinez* holds that the standards for competency are "modest." An accused who wishes to waive rights must "ha[ve] the capacity to understand the proceedings and to assist counsel." 113 S.Ct. at 2688. Petitioner's counsel conceded that petitioner was "able to understand the nature of the proceedings against him and to assist his counsel as to the proceedings against him." *State v. King*, *supra*, 84 Or. App. at 174 (quoting counsel's representations). The state court announced its decision in the same terms. *See* discussion *supra* at p.7 n.11. Thus, petitioner conceded and the

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[17](...continued)

state court must apply the correct legal standard to the facts of competency it finds); *Lafferty v. Cook*, 949 F.2d 1546, 1549-50 (10th Cir. 1991) (holding that the federal court reviews the legal standard applied by the state court *de novo*). That recognition is implicit in the Eighth Circuit's decision in *Griffin*, which began its analysis by discussing the legal standard for competency set out in this Court's opinion in *Dusky v. United States*, 362 U.S. 402 (1960), an acknowledgment that would have been superfluous if the court had viewed competency as solely a factual question. 935 F.2d at 929 n. 1. *Accord Davis v. Wyrick*, 766 F.2d 1197, 1201 (8th Cir. 1985).

state court found that petitioner met the standard this court recently announced.

II. Petitioner's claim of entitlement to an evidentiary hearing bears only on a legal issue that has dropped out of this case.

Petitioner argues that the Ninth Circuit, in applying the presumption of correctness to the state court's findings, denied him the opportunity to present evidence that would, he asserts, have demonstrated that those findings were wrong.[18] Petitioner is careful, however, never specifically to identify those issues on which he sought an evidentiary hearing. Nor does he offer any basis on which the Court could conclude that the sole issue on which he asked for an evidentiary hearing could have affected the outcome of the case.[19]

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[18]However one might characterize the claims presented by petitioner in this argument, they undeniably attack the *procedure* followed by the Ninth Circuit. *See* Pet. Cert. 18-19. Amicus GCDLA, by contrast, argues that the Ninth Circuit was substantively wrong in its application of due process principles to petitioner's efforts to reinstate the plea agreement. Indeed, the questions presented by GCDLA are neither those presented by petitioner nor fairly included therein as required by this Court's Rule 14.1(a). *Compare* Questions Presented, Pet. Cert. i, *with* Questions Presented, GCDLA Brief i. *Amici* may not expand the issues beyond those presented by the petitioner. *United States v. Dion*, 476 U.S. 734, 736 n. 3 and 746 (1986). Nor is the question that GCDLA seeks to present logically or legally antecedent to those presented by petitioner. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-38 (1991) (Stevens, J., dissenting) (listing cases in which the Court has resolved questions that are antecedent to those raised by the parties). To the contrary, the procedural question raised by petitioner necessarily is antecedent to the substantive issue GCDLA seeks to inject.

[19]One other aspect of petitioner's second argument deserves comment. Petitioner sets up his argument by asserting that the district court concluded that it did not have jurisdiction to resolve petitioner's claims and that, on appeal, the Ninth Circuit inappropriately resolved the merits without returning the case to the district court for an evidentiary hearing. The district court, however, fully considered the merits of petitioner's claims. It concluded that petitioner failed to state a claim of constitutional dimension

(continued...)

Petitioner requested an evidentiary hearing in the district court on one issue only: whether the state court correctly found that the state was prejudiced by petitioner's withdrawal from the plea agreement. Pet. Memo. 34–36.[20] Petitioner relied on 28 U.S.C. § 2254(d)(3) and (8), asserting that the record did not contain any factual support for the claim of prejudice, and on § 2254(d)(7), claiming that fundamental fairness required the state to specifically perform the plea agreement where, *inter alia*, the only prejudice it claimed involved the undocumented costs of trial preparation. Pet. Mem. 34–36. Petitioner did not ask for an evidentiary hearing on any other basis or on any other issue. In particular, petitioner did not ask for or otherwise suggest that he should receive an evidentiary hearing on the question of his competency to withdraw from the plea agreement.

In his petition to this Court, however, the only issue on which petitioner claims a right to an evidentiary hearing is his competency to withdraw from the plea agreement. Pet. Cert. 17 n. 6, and 18.[21] Because petitioner did not suggest to the lower

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[19](...continued)

that would invoke the habeas power, and it was only in that sense that the district court found that it did not have "jurisdiction" to grant petitioner habeas relief. *See* Pet. Cert. App. 37a.

[20]In addition to not seeking a hearing on his competency, petitioner did not ask the district court to hold an evidentiary hearing on the state court's finding that it was petitioner, not the state, who reneged on the agreement.

[21]Petitioner at times frames his second argument in vague terms, referring to his "inchoate claims" and his "plea agreement claims." Pet. Cert. 16, 17 n. 6, and 18. The only specific claim he mentions, however, is the competency issue. *Ibid.* For example, petitioner accuses the court of appeals of "jump[ing] to the conclusion that petitioner 'ha[d] not presented evidence *that he was incompetent* at the time of the court's ruling sufficient to establish by convincing evidence that the state court's determination was

(continued...)

courts that he was entitled to a hearing on his competency, he cannot fault either the district court or the Ninth Circuit for not addressing that unasserted claim. Thus, although petitioner correctly observes that *Townsend v. Sain*, 372 U.S. 293 (1963), requires district courts to hold evidentiary hearings under six specified circumstances, that assertion is irrelevant to the claims he presses in this Court. He never attempted to demonstrate that any of those circumstances applied to his competency claim.

If petitioner means to suggest that the district court erred by not holding an evidentiary hearing on the question of prejudice to the state — the only issue on which a hearing was requested — that claim no longer matters. Petitioner does not resurrect his original argument that due process requires the government to specifically perform a plea agreement in the absence of prejudice to the government's interests. That substantive issue is not advanced as an independent basis for certiorari, nor is it fairly subsumed within the questions petitioner presents. Unless petitioner plausibly can and actually does argue that due process *mandates* reinstatement of a previously rescinded plea agreement absent proof that the state was prejudiced by the rescission, an evidentiary hearing on prejudice can have no bearing on the case at this point.[22]

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[21](...continued)

erroneous.'" Pet. Cert. 18 (emphasis added). If petitioner intended to suggest that he was entitled to an evidentiary hearing on some other factual claim, he has neither identified that claim nor suggested how he demonstrated that entitlement within the terms of *Townsend v. Sain*, 372 U.S. 293 (1963).

[22]GCDLA does advance the substantive argument, or one related to it, by asserting that petitioner was entitled under the Due Process Clause to specific performance of the plea agreement. *See* n. 18, *supra*. GCDLA does not, however, attempt to suggest that the principle on which it relies is

(continued...)

In short, the broad question relating to the availability of federal evidentiary hearings that petitioner seeks to have this Court decide is not fairly presented by this case. Petitioner did not seek an evidentiary hearing on the competency question. Yet, he no longer seeks to enforce the plea agreement on any theory other than the theory that he was not competent to withdraw from it. Thus, any claim that he should have been entitled to an evidentiary hearing to examine whether the state was prejudiced by his refusal to enter his guilty plea is either academic or moot.

III. This case presents only a narrow question of "good cause" to toll the IAD time limit.

Article IV(c) of the IAD provides, in part, that "for good cause shown in open court," the court "may grant any necessary or reasonable continuance" beyond the 120-day period in which a transferred prisoner must be tried. Petitioner tries to present, as a third issue in the petition, a broad question of the ability of a superseding indictment to extend the 120-day period for trial under the IAD. Specifically, petitioner makes the expansive claim that the Ninth Circuit "interpreted the IAD in a way that is inconsistent with the interpretations of all other courts to address

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[22](...continued)

established. To the contrary, it presents this case as an "opportunity" to address rules of construction for plea agreements. GCDLA Brief 11. In other words, GCDLA asks the Court to announce a new rule in this case on habeas review — *viz.*, that due process entitles a criminal defendant who has partially performed the terms of a plea agreement and who then withdraws from the agreement before pleading guilty, to reinstate the agreement at will unless the state is prejudiced by the withdrawal. GCDLA does not urge that this rule is dictated by any prior decisions of this Court. Thus, it inevitably must be asking the Court to announce a new rule on collateral review, which the Court repeatedly has declined to do. *Gilmore v. Taylor*, 508 U.S. ___, 113 S.Ct. 2112 (1993); *Teague v. Lane*, 489 U.S. 288 (1989). GCDLA makes no claim that this case would fall within either of the two narrow exceptions to the *Teague* rule.

the issue by holding that the filing of a superseding indictment extends the time period specified by the IAD within which a state may try a prisoner held in custody pursuant to that Agreement." Pet. Cert. 19. In fact, the issue is narrow and distinctly fact-bound: May a state court find "good cause" for a continuance to allow the state to cure an arguably defective indictment, thereby tolling the 120-day period of the IAD, when the defendant's motion to dismiss the indictment is made on the eve of trial?[23] Before addressing that question, it is necessary to describe the true nature of the first indictment and its dismissal.

1. *The dismissal of the first indictment.*

Article VII (Amended), section 5, of the Oregon Constitution provides, in part: "A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment."[24] Or. Rev. Stat. § 132.110 allows the discharge of a grand juror who is unable to continue in the performance of duties. That statute provides that the court may "[a]llow at least five grand jurors to proceed upon good cause shown."

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[23]As the district court pointed out in this case, its conclusion that the continuance was for good cause

> does not require a finding that reindictment *automatically* recommences the time limitations of the IAD. Rather, the only issue is whether a trial court has the discretion to grant a continuance, upon a timely motion by the State, to permit the State to resubmit the case to the grand jury *under the circumstances presented here.*

Pet. Cert. App. 33a (emphasis added; citation omitted).

[24]Echoing the constitutional provision, Or. Rev. Stat. § 132.360 provides:

> A grand jury may indict or present to the court for instruction as provided in ORS 132.370, with the concurrence of five of its members, if at least five jurors voting for the indictment or presentment heard all the testimony relating to the person indicted or facts presented.

Petitioner's first indictment was returned by a grand jury that initially consisted of seven grand jurors. Exh. 119, at 209. Later, one of the grand jurors was excused for business reasons. Exh. 119, at 212. Trial was set for April 18, 1983.[25] On April 11, 1983, on petitioner's motion, the trial court dismissed the first indictment, ruling that the grand juror's release had not been for "good cause" under Or. Rev. Stat. § 132.110. Exh. 119, at 241. In doing so, the trial court gave the state leave to resubmit the case to the grand jury and ordered a 30-day continuance (until May 15, 1983) for that purpose. Exh. 119, at 294–95.[26] The trial court found good cause for the continuance. Exh. 119, at 295–96.[27] On April 19, 1993, petitioner moved under the IAD to dismiss the indictment with prejudice for failure to try him within the 120-day period. Exh. 105. The trial court denied petitioner's motion, stating that "good cause has been shown [for the continuance] by the resubmission of the case to the Grand Jury . . . ." Exh. 119, at 320–21.

Or. Rev. Stat. § 135.510 provides the exclusive statutory grounds for dismissing an indictment, *State v. Stout*, 305 Or. 34, 41, 749 P.2d 1174 (1988), none of which includes that one grand juror improperly was dismissed. *State v. Conger*, 319 Or. 484,

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[25]Petitioner arrived in Oregon on November 20, 1982. Ex. 106; *State v. King, supra*, 84 Or. App. at 169. Due to continuances to which petitioner agreed, trial was set for April 18, 1983. Exh. 106.

[26]Petitioner was not tried until August, 1984, due to continuances he requested.

[27]The trial court's order stated:

> THE COURT FINDS that the original indictment herein, having been quashed/set aside, and the Court having given leave to the State to resubmit the case to the Grand Jury, there exists good cause shown that this case be continued for thirty days * * *.

State v. King, supra, 84 Or. App. at 169 (quoting trial court order).

489, ___ P.2d ___ (1994). Further, under the Oregon Constitution, "a grand jury in which five or six members are participating may find an indictment, so long as five grand jurors concur in doing so." *State v. Conger, supra*, 319 Or. at 502. In short, although the issue was not settled at the time, the Oregon trial court that dismissed petitioner's first indictment did so incorrectly.[28]

2. *Because the continuance was for good cause, the 120-day time limitation was tolled; no conflict exists among the circuits.*

In light of the accurate description of the first indictment and its dismissal set out above, the question presented regarding the

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[28]Petitioner states that "it is undisputed that petitioner was not even properly *indicted* within the time period specified in Article IV(c)." Pet. Cert. 20 (emphasis in original). He asserts that the state "knew" the first indictment "was patently unconstitutional under Oregon law." Pet. Cert. 20. *Amici* NACDL, ACDLA, and OCDLA repeat this misstatement: "[T]he very need for a superseding indictment was generated by the patently unreasonable action of the state in obtaining the original indictment in a knowingly illegal manner." Brief of *Amici* 17. *See* Brief of *Amici* 16 (the detainer was based on an indictment that was "knowingly and fraudulently obtained in violation of the Oregon Constitution.") Petitioner represents that the state had "full knowledge, *ab initio*, that the original indictment [was] entirely deficient." Pet. Cert. 21. Finally, petitioner states that the need to obtain the superseding indictment in this case was "occasioned by the bad faith of the prosecutor in securing the original indictment." Pet. Cert. 23.

Petitioner's and *amici*'s allegations ring especially hollow in light of the Oregon Supreme Court's clear holding in *State v. Conger, supra*, that an indictment returned by a grand jury of fewer than seven is constitutionally adequate, and is not subject to dismissal for failure to comply with statutory criteria for discharging grand jurors. At the time in question, it was settled practice in Oregon to discharge one and sometimes two grand jurors pursuant to the statute authorizing that procedure. The constitutionality of the statutory procedures was called into question only after the Oregon Court of Appeals' decision in *Goodwin v. State of Oregon*, 116 Or. App. 279, 840 P.2d 1372 (1992). The state of the law at the time petitioner was indicted — especially in light of the issue's ultimate resolution — does not even arguably justify the strident charges that state officials acted in "bad faith," "fraudulently," or "illegally" in securing the indictment against petitioner.

IAD is: When a criminal defendant moves one week before trial to dismiss an indictment, and the trial court incorrectly grants that motion, does the court's grant of a continuance to allow the prosecution to reindict constitute "good cause" for purposes tolling the 120-day period of the IAD?[29] The Ninth Circuit, agreeing with the Oregon Court of Appeals and the district court, concluded:

> The unanimous indictment was technically defective, but King did not move to dismiss it until the end of the time period, so the state had good cause for a thirty day continuance to take the case to a grand jury for another indictment.

Pet. Cert. App. 16a. The trial court had good cause to grant a continuance for the state to seek reindictment when petitioner moved to dismiss the first indictment nearly six months after he was arraigned in Oregon and only one week before his trial was to begin. *See* Or. Rev. Stat. § 135.520 (motion to dismiss must be filed within 10 days after arraignment); *State ex rel. Schrunk v. Bonebrake*, 318 Or. 312, 865 P.2d 1289 (1994) (motion to dismiss on grounds that grand jury was not composed of correct number must be filed timely under the statute). The Ninth Circuit's holding is correct.

Petitioner contends that the existence of a conflict among the circuits and various state courts requires review by this Court. Pet. Cert. 19. Petitioner, however, severely overstates the

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[29]This question also replaces that posed by *amici* NACDL, ACDLA, and OCDLA:

> May the strict time limits of the Interstate Agreement on Detainers be extended by the state's need to obtain a superseding indictment following the dismissal of an indictment which was *unconstitutionally* obtained?

Brief of *Amici* i (emphasis added).

breadth of the Ninth Circuit's holding; as a result, he overstates the existence of a conflict. Whether a continuance in any given case is supported by "good cause" inherently is a fact-intensive question. The Ninth Circuit's pronouncement was limited: When a criminal defendant moves to dismiss an arguably defective indictment on the eve of trial and at the end of the IAD time period, the state has good cause for a 30-day continuance to seek an almost certain reindictment. Once the narrow, case-specific nature of the Ninth Circuit's holding is recognized, petitioner's perceived conflict evaporates. That is, in none of the cases cited by petitioner has a court held, in the circumstances of this case, that a continuance would not be for good cause, thus tolling the 120-day IAD time limitation.[30]

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[30]In *United States v. Cephas*, 937 F.2d 816, 821 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992), for example, the Second Circuit addressed the government's argument "that because the charges against [the defendant], which had been the basis for the original detainer in issue, were dismissed, the detainer clock *automatically* stopped ticking and the 180-day period under article III disappeared." 937 F.2d at 821 (emphasis added). The Second Circuit's holding, which has nothing to do with the existence of "good cause," was that "[t]he government cannot lodge a detainer against the defendant and then throw out the clock every time it dismisses charges, only to start the clock anew by bringing a new set of charges." *See also People v. C'Allah*, 100 A.D.2d 754, 474 N.Y.S.2d 305 (N.Y. App. 1984) (rejecting state's argument that a new indictment erased the first indictment, thereby making the 180-day Article III time limit inapplicable). The state has no quarrel with those general statements. More importantly, they are not inconsistent with the Ninth Circuit's holding in this case.

Nor does *State v. Shaw*, 98 N.M. 580, 651 P.2d 115 (N.M. App. 1982) support the existence of a conflict. Like *Cephas* and *C'Allah*, *Shaw* rejected the state's argument that a second indictment started anew the running of the 180-day period under Article III. 651 P.2d at 118–19. The *Shaw* court noted that the state never had argued that the need to obtain a second indictment tolled the initial 180-day period, and it suggested that the prosecution should have sought a continuance for good cause — which was done here. 651 P.2d at 119-120.

(continued...)

Unlike the cases cited by petitioner, the state never argued in this case — and the Ninth Circuit did not hold — that the dismissal of the first indictment made the 120-day time limitation "disappear." The Ninth Circuit did not hold that the second indictment started a new 120-day time limitation. Nor did the appeals court hold that any continuance for reindictment "automatically" is a continuance for good cause, tolling the IAD time limitation.

Petitioner also asserts that the Ninth Circuit's decision in this case conflicts with decisions in the Second and Fifth Circuits addressing "administrative snafus." Pet. Cert. 23. In support of that proposition, he cites *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993), *United States v. Ford*, 550 F.2d 732 (2d Cir. 1977), *aff'd sub nom United States v. Mauro*, 436 U.S. 340 (1978), and *People v. Allen*, 744 P.2d 73 (Colo. 1987). Yet, none of those cases addressed a situation where, because of a defendant's successful eleventh-hour motion to dismiss an indictment — one that is, at most, technically defective — the state needs time to secure a second indictment. This case does not involve an "administrative snafu," but rather a reasonable need to react to a defendant's late motion.[31] No conflict exists.

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[30](...continued)

Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979), cited by *amici* NACDL, ACDLA, and OCDLA is inapposite. In that case, the court never addressed whether a requested continuance was supported by "good cause." Rather, the court's only remotely relevant statements addressed the "shown in open court" requirement of Article IV. 587 F.2d at 839.

[31]In *Birdwell*, the issue was under what circumstances a continuance would toll the time limitation. The *Birdwell* court held:

> A continuance which is granted to allow a party to ascertain whether testimony is necessary for a dismissal hearing is not

(continued...)

By refusing to recognize the limited nature of the Ninth Circuit's holding, by ignoring the case-specific character of the "good cause" determination, and by quoting opinions from other courts out of context, petitioner has attempted to create a conflict out of thin air.

IV. *Reed v. Farley* does not supply an independent basis to grant certiorari.

In his supplemental memorandum of authority, petitioner suggests that "this case provides the Court with an opportunity to address the precise question it left open in *Reed* [*v. Farley*, No. 93-5418] — whether a prisoner who objects to delay can state a claim cognizable under Section 2254." Memo. 2-3; *see also* Brief of *Amici* 5-6 (same). To the contrary, this case is not one in which the Court should grant certiorari to address whether a trial court's failure to observe the 120-day rule of Article IV(c) is cognizable in federal habeas.

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[31](...continued)

> upon good cause when the party requesting the continuance could have made the determination prior to the hearing by using reasonable diligence. Good cause did not exist in this case[.]

983 F.2d at 1340. That case-specific statement is not inconsistent with the Ninth Circuit's decision in this case.

Nor is the holding in *Ford* inconsistent with the Ninth Circuit's decision in this case. In *Ford*, the court found that the delays that occurred before defendant was tried were not for "good cause" when they were the result of the defendant's case being shuffled among different courts and being delayed due to a congested docket. 550 F.2d at 743. That fact-specific conclusion is not inconsistent with the Ninth Circuit's decision in this case.

Finally, in *Allen*, the issue was whether the defendant had waived the 120-day period by acquiescing in the setting of two trial dates outside of the 120-day period. Due to "an unfortunate combination of circumstances," 744 P.2d at 77, not all parties were aware of existence of the 120-day period. *Allen* stands only for the rule that the burden is on the prosecution to ensure that the trial is set within the period required by the IAD. Again, that has nothing to do with the issue decided by the Ninth Circuit in this case, *viz.*, whether the particular facts of this case constitute "good cause."

Whether a violation of Article IV's 120-day period is cognizable under 28 U.S.C. § 2254 never has been contested by the state; under controlling Ninth Circuit precedent, *see, e.g., Cody v. Morris*, 623 F.2d 101, 103 (9th Cir. 1980), the state was bound to accept that the district court had jurisdiction to consider the IAD claim. Accordingly, the issue was not considered in the first instance by the district court or the court of appeals; the issue would be better addressed by this Court in a case where it was raised below. Moreover, this Court necessarily will address the issue left open in *Reed* in any case that presents a valid issue regarding the IAD. It would make little sense for the Court to grant certiorari to address the *Reed* issue in this case, where the substantive IAD issue is meritless.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

THEODORE R. KULONGOSKI
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THOMAS A. BALMER
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
ROBERT M. ATKINSON
ROBERT B. ROCKLIN
Assistant Attorneys General
Counsel for Respondent

September 15, 1994

APPENDIX A

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO241 (Rev. 5/85)

United States District Court	District: Oregon	
Name: ROBERT HADEN KING, JR.	Prisoner No.: 284587	Case No.: CV90-315DA
Place of Confinement: Clallam Bay Corrections Center, Clallam Bay, WA		
Name of Petitioner (include name under which convicted): Robert Haden King, Jr. V.	Name of Respondent (authorized person having custody of petitioner): Neil Brown Superintendent Clallam Bay Corrections Center	
The Attorney General of the State of: Oregon		

PETITION

1. Name and location of court which entered the judgment of conviction under attack Circuit Court of State of Oregon for Clackamas County, 807 Main Street, Oregon City, OR 97045
2. Date of judgment of conviction Nov. 13, 1984
3. Length of sentence Life with 30 year mandatory minimum consecutive to sentence defendant serving in Washington state.
4. Nature of offense involved (all counts) Aggravated Murder

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5. What was your plea: (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another county or indictment, give details: _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:
   (a) Name of court Oregon Court of Appeals
   (b) Result Conviction Affirmed
   (c) Date of result and citation, if known March 4, 1987
   State v. King, 84 Or.App. 167 (1987)
   (d) Grounds raised (1) Violations of Interstate Agreement on Detainers; (2) failure to specifically enforce plea bargain; (3) improperly obtained indictment; (4) transactional immunity and double jeopardy; (5) tainted identification testimony; (6) hypnotically enhanced testimony; (7) prosecutorial misconduct; (8) insufficient evidence.
   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
      (1) Name of Court Oregon Supreme Court
      (2) Result Review Denied
      (3) Date of result and citation, if known May 27, 1987
      (4) Grounds raised Same as direct appeal.

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(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal: N/A

(1) Name of Court _____

(2) Result _____

_____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information: N/A

(a) (1) Name of court _____ _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

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(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

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(j) Denial of right of appeal.

A. Ground one: Conviction obtained by a violation of petitioner's rights to due process and against self-crimination since trial court failed to specifically enforce plea bargain.

Supporting FACTS (state *briefly* without citing cases or law) Plea Agreement to allow petitioner to plead to reduced charge in exchange for his cooperation in the prosecution of a co-defendant. Petitioner substantially performed his duties under the Plea Agreement by providing information and testimony. Plea Agreement included no time limit for entry of guilty plea and prosectuion's subsequent insistence that plea be entered on a specific date violated the terms. Petitioner did not knowingly and voluntarily relinquish his rights under the Agreement.

B. Ground two: Prosecution barred by Article VI(b) of the Interstate Agreement on Detainers since petitioner was "mentally ill"; petitioner was entitled to an evidentiary hearing to establish mental illness.

Supporting FACTS (state *briefly* without citing cases or law):

Prior to his transfer from Washington to Oregon under the Interstate Agreement on Detainers, petitioner had been determined to be "mentally ill" or impaired by a mental defect. Pending trial in Oregon petitioner became mentally. The trial court's

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hearing violated the Interstate Agreement on Detainers.

C. Ground three Petitioner's prosecution was barred under the speedy trial provisions of the Interstate Agreement on Detainers.

Supporting FACTS (state *briefly* without citing cases or law): On 11-20-82 Oregon took custody of petitioner under the I.A.D. Petitioner expressly consented to extensions of the speedy trial period totalling 29 days. On 4-11-83 the trial court quashed the original indictment. On 4-18-83 the State filed a second indictment. On 4-19-83 the State filed a third indictment and moved to dismiss the second indictment. Defendant's motion to set aside the indictment on statutory speed trial grounds was denied and the State's motion to postpone trial for an additional 30 days was granted improperly.

D. Ground four _____

Supporting FACTS (state *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing William T. Lyons

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(b) At arraignment and plea William T. Lyons, Michael J. Clancy

(c) At trial William T. Lyons, Michael J. Clancy

(d) At sentencing William T. Lyons, Michael T. Clancy

(e) On appeal John Daugirda

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17. Do you have any further sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be serve in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

[signature omitted in printing]
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on 12/10/89
(date)

/s/ Robert H. King Jr.